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NO. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HERMAN SANFORD BENNETT

Petitioner

-vs.-

THE STATE OF TEXAS

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Assuming, arguendo, that law enforcement agents have probable cause to believe that illegal drugs are located inside a private residence, is the Fourth Amendment's proscription against unreasonable searches and seizures violated when those agents, without giving any consideration to the possibility of obtaining a warrant, make a forced, warrantless entry into the residence, make a warrantless seizure of the contents of that residence, and make a warrantless arrest of the owner of that residence solely due to a belief that the contraband might possibly be destroyed and a belief that the owner might possibly leave the residence?

2. Whether a belief that contraband might be in a residence and might be destroyed or removed constitutes sufficient exigent circumstances to allow law enforcement agents to forcibly enter a residence, seize the contents of the residence, and arrest the owner without a warrant, and then, utilizing and relying upon evidence obtained as a result of that forced, warrantless entry, seizure and arrest, obtain a search warrant?

3. Whether a State statute that allows warrantless arrests upon probable cause to believe that a felony has been committed and that the offender is about to escape conflicts with the Fourth Amendment when that statute is relied upon by law enforcement agents to forcibly enter a residence, seize the contents of the residence, and arrest the owner without a warrant and without exigent circumstances?

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OPINIONS BELOW

As reflected below in the statement of this Court's jurisdiction, the opinions of the Court of Appeals for the Third Supreme Judicial District of Texas and of the Court of Criminal Appeals of Texas are contained in Appendices 1 and 2, respectively [under separate cover, pursuant to Rule 21.1(k)].

JURISDICTION

On June 13, 1984, a three judge panel of the Court of Appeals for the Third Supreme Judicial District of Texas issued an unpublished opinion affirming Petitioner's conviction. See Appendix 1. On petition for discretionary review to the Court of Criminal Appeals of Texas, the Court of Criminal Appeals issued an unpublished opinion on September 17, 1986, affirming Petitioner's conviction. See Appendix 2. A motion for rehearing was timely filed on October 2, 1986, and supplemented on October 8, 1986, and November 17, 1986. See Rule 230(a and b), Texas Rules of Appellate Procedure. On November 19, 1986, the motions for rehearing were overruled. See Appendix 3. On November 20, 1986, a third supplemental motion for rehearing and a motion to stay the proceedings was filed. On November 26, 1986, the motion for rehearing was overruled, but the issuance of the mandate was stayed for sixty days. See Appendix 4.

Accordingly, pursuant to Rule 20.1, 20.4 and 29 of this Court's rules, the petition is due to be filed on or before January 19, 1987 [i.e., 60 days from November 19, 1986]. This Court has jurisdiction to review the judgment of the Court of Criminal Appeals of Texas (i.e., Appendix 2) under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV: Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Article 14.04, Vernon's Ann. C.C.P.: Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused.

STATEMENT OF THE CASE

Viewed in a chronological perspective and incorporating the matters mandated by Rules 21.1(g and h) of this Court's rules, the pertinent facts are as follows:

In January 1982, Austin Police Department Officer Delbert Foree spoke four times with a female known only to him as Eddie. Each of their conversations regarded the potential purchase by Foree of a quarter pound of methamphetamine from Eddie.

On January 16, 1982, Foree met Eddie in a parking lot in Austin, Texas. A number of additional law enforcement officers were on the scene conducting surreptitious surveillance. Eddie directed Foree to follow her to a laundromat. Once Eddie and Foree arrived at the laundromat, Eddie left her ten year old daughter with Foree while she departed, allegedly to obtain a quarter pound of methamphetamine.

The surveillance officers followed Eddie to a residence at 1613 West 9th Street, Austin, Texas, which was approximately five minutes away from the laundromat where Foree and Eddie's daughter were waiting. Eddie arrived at the residence at 12:15 p.m. and left at 12:30 p.m. When she left the residence, the surveillance officers did not see her carrying anything that she had not arrived with. Eddie returned to the laundromat and gave Foree a "sample" of methamphetamine. Shortly thereafter, Eddie left Foree and her daughter at the laundromat and was followed by the surveillance officers back to the residence at 1613 West 9th Street. Upon her arrival there, she went to the front door, but did not enter the

residence. Eddie returned to the laundromat and told Foree that the occupants of the residence would not open the door. Eddie also told Foree that the sample she had previously given him had come from the quarter pound of methamphetamine she was getting for him and that there was more methamphetamine available, but she did not state where or from whom the methamphetamine was to be obtained. Eddie suggested that Foree meet her back at the laundromat between 1:30 p.m. and 1:45 p.m. and all parties departed. Eddie was not followed when she left the laundromat.

At approximately 2:10 p.m. the surveillance officers who were stationed at the residence (*only in front of it*) at 1613 West 9th Street observed Eddie arrive and enter that residence. At approximately 2:25 p.m., Eddie left the residence and returned to the laundromat. When she left the residence, the surveillance officers did not see her carrying anything she had not arrived with. At approximately 2:35 p.m., Eddie delivered a quarter pound of methamphetamine to Foree.

Foree chemically tested the substance and determined it to be methamphetamine. Eddie then asked for the $5,000 Foree owed her for the methamphetamine. She then told Foree that she needed to return to the house as soon as possible as the occupants were about to leave. Foree gave the signal for the surveillance officers stationed at the laundromat to arrest Eddie. Eddie made no post arrest statements to the officers relative to the source of the methamphetamine or the occupants of the residence at 1613 West 9th Street.

While Eddie was being "busted", the officers on surveillance at the house observed a brown car stop in front of the house. At approximately 2:40 p.m., a white male got out of the car and went inside. The surveillance officers relayed this information to Officer Foree by radio. In the meantime, Foree and the other officers at the laundromat ". . . decided that it would be better to just go ahead and secure the residence at that time so that we wouldn't have any other people coming and going from the residence and hopefully not to allow the people to destroy any further evidence that would be in the residence." There was no discussion about the legalities of not obtaining a warrant and no discussion regarding how long it might take to obtain a warrant.

Thus, while Foree remained at the laundromat with Eddie, other officers went to the residence, met the surveillance officers thereat, and made a forced, warrantless entry into the residence. Petitioner, and one additional person who was inside the residence,

were arrested, without a warrant, and a quantity of what was believed to be methamphetamine was seized on the kitchen table.

Thereafter, Foree and two of the officers who had made the forced, warrantless entry into the residence took Eddie to the Austin Police Department, booked her, and filled out an affidavit for a search warrant and an arrest warrant. That affadavit for search warrant contained facts learned by the officers *after their warrantless, forced entry into the residence* (i.e., it recited that what was believed to be methamphetamine had been found in plain view inside the residence on the kitchen table). At 4:08 p.m., Magistrate Phillips issued a search warrant for 1613 West 9th Street, Austin, Texas, and an arrest warrant for Petitioner.

The search/arrest warrant was taken back to the residence and a search was conducted. Additional quantities of methamphetamine other than that found on the kitchen table were unearthed during the search. Other than the methamphetamine found in the residence, the record fails to reveal WHERE OR WHEN EDDIE ACTUALLY OBTAINED THE METHAMPHETAMINE SHE GAVE FOREE.

Petitioner was indicted in March 1982 for possession of methamphetamine. R. I-2. In the trial court, Petitioner contested the legality of the warrantless, forced entry into his residence, his warrantless arrest, and the seizure of all of the methamphetamine as violative of the Fourth Amendment and Article 14.04, Vernon's Ann. C.C.P. R. I-11. In an extensive memorandum in support of his motion to suppress, R. I-12, Petitioner specifically alleged that there were no exigent circumstances to justify the warrantless, forced entry to the residence, the warrantless arrest of Petitioner, and the warrantless seizure of the methamphetamine on the kitchen table. Petitioner further alleged that absent that initial illegality, the search/arrest warrant issued by Magistrate Phillips would not have been issued since it contained information that was the fruit of that initial illegality (i.e., that absent such information, Magistrate Phillips would not have issued the search/arrest warrant).

On April 2, 1982, at a hearing on the motion to suppress, the State of Texas stipulated that if Magistrate Phillips were present, he would testify

> ". . . that had the affidavit and warrant not contained the information that it does, that the officers who went inside the residence without a search warrant and observed

> methamphetamine or what they believe to be methamphetamine in the premises, without a warrant, had that not been in there he would not have found probable cause." R. II-5.

On October 22, 1982, the District Council overruled the motion to suppress. R. II-10A-10C.

On December 13, 1982, a trial before the Court was held. R. II-1 *et seq.* At that time, the affidavit in support of the combination search/arrest warrant was introduced and the facts outlined above were extensively developed. Petitioner unsuccessfully reurged the legal contentions contained in his motion to suppress at that time. R. III-7-9, 12-13, 122-126. The District Court found Petitioner guilty. R. I-34-35.

On January 10, 1983, the District Court sentenced Petitioner. R. III-130-137. A surety bond pending appeal was set at $7,500. Petitioner made bail and appealed to the Court of Appeals for the Third Supreme Judicial District Court of Texas. In his brief to that Court, Petitioner's first three points of error alleged, respectively that: (1) there were insufficient exigent circumstances to justify a forcible, warrantless entry into Petitioner's residence; (2) there was no probable cause to search the residence or arrest Petitioner at the time of the warrantless, forced entry; and (3) the search warrant eventually obtained (before a total search of the residence was conducted) was based on evidence seized as a result of the warrantless, forced entry. Petitioner again relied upon the Fourth Amendment and Article 14.04, *supra*.

As reflected in Appendix 1, the Court of Appeals found probable cause and exigent circumstances for the warrantless, forced entry and search of the residence and the warrantless arrest of Petitioner inside said residence.

In Petitioner's petition for discretionary review to the Court of Criminal Appeals of Texas, *cf.* Rule 202, Texas Rules of Appellate Procedure, he alleged, *inter alia*, that the Court of Appeals had improperly held that Article 14.04, Vernon's Ann. C.C.P. was satisfied and that the State had failed to prove sufficient exigent circumstances under the Fourth Amendment to justify the warrantless entry of the residence. See Joint Brief On The Merits in the Court of Criminal Appeals.

As reflected in Appendix 2, four judges of the Court of Criminal Appeals of Texas held that Article 14.04, *supra*, was satisfied so that, under State law, a warrantless arrest of Petitioner

was justified. Those four judges also held that since a warrantless arrest of Petitioner was justified under State law which was more restrictive than the Fourth Amendment, the State had fulfilled its burden under the Fourth Amendment to demonstrate sufficient exigent circumstances to justify a warrantless entry of Petitioner's residence. One judge concurred in the result without an opinion and two judges filed an opinion concurring in the result. Two other judges filed dissenting opinions.

In Petitioner's motion for rehearing to the Court of Criminal Appeals, Petitioner asserted, *inter alia*, that the Court's interpretation of and application of Article 14.04, *supra*, was contrary to *Payton v. New York, infra*, and *Welsh v. Wisconsin, infra*. This contention was not addressed by the Court on rehearing.

REASONS FOR GRANTING THE WRIT

1. THIS COURT SHOULD CLARIFY THE SCOPE OF THE EXIGENT CIRCUMSTANCES EXCEPTION TO THE WARRANT REQUIREMENT WHERE THE ARREST OCCURS INSIDE THE RESIDENCE OF THE ARRESTEE.

a. Prior Opinions Of This Court Indicate A Need To Clarify Whether A Belief By Law Enforcement Agents That Contraband Might Be Destroyed Or That The Owner Of The Residence Might Depart Constitute Exigent Circumstances.

In *Payton v. New York*, 445 U.S. 573 at 583-590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), this Court considered the constitutionality of a New York statute that authorized police officers to forcibly enter a private residence without a warrant to make a routine felony arrest. This Court held that absent probable cause and exigent circumstances, a warrantless, non-consentual entry of a residence to arrest the owner is unreasonable under the Fourth Amendment. However, the Court specifically stated that ". . . we have no occasion to consider the sort of emergency or dangerous situation described in our cases as 'exigent circumstances', that would justify a warrantless entry into a home for the purpose of either arrest or search."

One year after *Payton, supra*, this Court held that absent exigent circumstances, law enforcement agents could not enter a third person's home without a search warrant to arrest a suspected

felon, even where they had a valid warrant for the felon's arrest. *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981). At 450 U.S. 221, this Court stated that

> ". . . if probable cause exists, no warrant is required to apprehend a suspected felon in a public place. *United States v. Watson*, 423 U.S. 411, 46 L.Ed.2d 598, 96 S.Ct. 820 (1976). Thus, the subject of an arrest warrant can be readily seized before entering or after leaving the home of a third party.[14]"
>
> "14. Indeed, the 'inherent mobility' of persons noted by the Government suggests that in most situations the police may avoid altogether the need to obtain a search warrant simply by waiting for a suspect to leave the third person's home before attempting to arrest that suspect."

Four years after *Payton*, in *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984), this Court granted certiorari to address at least one portion of the question of "exigent circumstances" left unresolved in *Payton*: whether the Fourth Amendment prohibits a warrantless, nighttime entry of a person's home in order to arrest him for a non-jailable traffic offense. 466 U.S. at 742. *Welsh* involved a decision of the Wisconsin Supreme Court which had upheld a warrantless arrest in the home on the basis of three factors which it believed constituted exigent circumstances: (1) the need for "hot pursuit" of a suspect; (2) the need to prevent physical harm to the offender and the public; and (3) the need to prevent destruction of the evidence. In assessing the situation before it, this Court stated:

> Prior decisions of this Court, however, have emphasized that exceptions to the warrant requirement are "few in number and carefully delineated," United States v. United States District Court, supra, at 318, 22 L.Ed.2d 752, 93 S.Ct. 2125, and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests. Indeed, the Court has recognized only a few such emergency conditions, see e.g., United States v. Santana, 427 US 38, 42-43, 49 L.Ed.2d 300, 96 S.Ct. 2406 (1976) (hot pursuit of a fleeing felon); Warden v. Hayden, 387 US 294, 298-299, 18 L.Ed.2d 782, 87 S.Ct. 1642 (1967) (same); Schmerber v.

California, 384 US 757, 770-771, 16 L.Ed.2d 908, 86 S.Ct. 1826 (1966) (destruction of evidence); Michigan v. Tyler, 436 US 499, 509, 56 L.Ed.2d 486, 98 S.Ct. 1942 (1978) (ongoing fire), and has actually applied only the "hot pursuit" doctrine to arrests in the home, see Santana, supra.

This Court ultimately rejected the three justifications proffered as demonstrating exigent circumstances by the State in *Welsh*. The Court stated:

> "The State attempts to justify the arrest by relying on the hot pursuit doctrine, on the threat to public safety, and on the need to preserve evidence of the petitioner's blood-alcohol level. On the facts of this case, however, the claim of hot pursuit is unconvincing because there was no immediate or continuous pursuit of the petitioner from the scene of a crime. Moreover, because the petitioner had already arrived home, and had abandoned his car at the scene of the accident, there was little remaining threat to the public safety. Hence, the only potential emergency claimed by the state was the need to ascertain the petitioner's blood-alcohol level.
>
> Even assuming, however, that the underlying facts would support a finding of this exigent circumstance, mere similarity to other cases involving the imminent destruction of evidence is not sufficient. The State of Wisconsin has chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment is possible. See Wis State § 346.65(2) (1975 § 346.65(2) (a) (supp 1983-1984); supra, at 746, 80 L.Ed.2d, at 740-741. This is the best indication of the State's interest in precipitating an arrest, and is one that can be easily identified both by the courts and by officers faced with a decision to arrest. See n 6, supra. Given this expression of the State's interest, a warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant." 466 U.S. at 753-754.

Thus, this Court to date has only sanctioned one exigent circumstance to allow a warrantless entry and arrest in the home: hot pursuit.[1]

The lower federal courts, on the other hand, have recognized that a fear of the destruction of evidence is an exigent circumstance that may justify a warrantless entry into a private residence. See e.g., *United States v. Vasquez*, 638 F.2d 507 (2nd Cir. 1980); *United States v. Rubin*, 474 F.2d 262, 268 (3rd Cir.), *cert. denied*, 414 U.S. 833 (1973); *United States v. Turner*, 650 F.2d 526 (4th Cir. 1981); *United States v. Thompson*, 700 F.2d 944 (5th Cir. 1983); *United States v. Delguyd*, 542 F.2d 346 (6th Cir. 1976); *United States v. Rosselli*, 506 F.2d 627 (7th Cir. 1974); *United States v. Fulton*, 549 F.2d 1325 (9th Cir. 1977).

This Court should decide whether the possible destruction of evidence can constitute an exigent circumstance and, if so, what burden must be shouldered by the law enforcement agents relying upon that possible destruction as an exigent circumstance. Furthermore, in light of *Steagald, supra*, this Court should also decide whether a belief that the occupant may leave a residence constitutes an exigent circumstance.

The scope of the exigent circumstances exception to the Fourth Amendment is an issue of national importance. Congress has recently enacted extensive legislation addressing the war on drugs. See Public Law 99-570; "Anti-Drug Abuse Act of 1986." Law enforcement officers should be given guidance in this area if they are to attempt to satisfy the dictates of the Fourth Amendment.

b. *Segura v. United States*, 468 U.S. 769, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984), Does Not Control The Disposition Of This Case.

In *Segura, supra*, this Court held

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[1] In *Mincy v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), this Court disapproved, as an exigent circumstance justifying a warrantless entry and search, the need of law enforcement authorities to promptly investigate the scene of a serious crime. *See also Thompson v. Louisiana*, ___ U.S. ___, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984). Similarly, in *Vale v. Louisiana*, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970), this Court held that there were no exigent circumstances to allow a warrantless entry and search of a residence where the defendant had been arrested outside of his residence and there was no indication that there was anyone else inside the residence who would destroy any evidence.

> ". . . that where officers, having probable cause, enter premises, and with probable cause, arrest the occupants who have legitimate possessory interests in its contents and take them into custody and, for no more than the period here involved, secure the premises from within to preserve the status quo while others, in good faith, are in the process of obtaining a warrant, they do not violate the Fourth Amendment's proscription against unreasonable seizures." 468 U.S. at 798 (footnote omitted).

Unlike *Segura*, there was no testimony in this case that the agents entered the residence in order to secure it so that a search warrant could be obtained. Indeed, the record is devoid of any testimony that any of the officers even considered the possibility of obtaining a warrant or even contacting a magistrate to ascertain if one could be available before the warrantless, forced entry was made. Furthermore, unlike *Segura*, the search warrant affidavit in this case contained evidence seized during the initial entry, which evidence the Magistrate found critical to his decision that probable cause was reflected in the affidavit. Thus, *Segura* does not control the disposition of this case and hence it does not nullify the propriety of a grant of certiorari herein.

2. THIS COURT SHOULD RESOLVE A CONFLICT BETWEEN ARTICLE 14.04, VERNON'S ANN C.C.P. AND THE FOURTH AMENDMENT.

Article 14.04, *supra*, provides that:

> "Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused."

In *Milton v. State*, 549 S.W.2d 190, 192 (Tex. Cr. App. 1977), Article 14.04 was interpreted to impose greater restrictions on law enforcement officers than the Fourth Amendment. However, in the present case, the Court of Criminal Appeals relied upon Article 14.04 to justify the warrantless, forced entry into Petitioner's residence, the warrantless seizure of the contents of the residence, and Petitioner's warrantless arrest: (1) without any evidence that there was any consideration given by the officers to whether they

could obtain a warrant; (2) without any evidence that anyone was going to escape (as opposed to merely leaving the residence); and (3) without any evidence of any pursuit. Furthermore, the residence was under surreptitious surveillance and anyone leaving the residence could have been followed and arrested. See Appendix 2. Nevertheless, the Court of Criminal Appeals concluded that since Article 14.04 was satisfied, and since Article 14.04 was more restrictive than the Fourth Amendment, sufficient exigent circumstances were demonstrated to satisfy the Fourth Amendment. See Appendix 2. As such, the Court of Criminal Appeals interpreted the statute so that it is in conflict with the Fourth Amendment by allowing a forcible, warrantless entry into a private residence, a warrantless seizure of the contents of that residence, and the warrantless arrest of the owner of that residence solely due to a belief that contraband was present in the residence and might possibly be destroyed and/or that the occupants of the residence might leave. Accordingly, Article 14.04, as interpreted and applied in this case, conflicts with the comments of this Court in *Steagald v. United States, supra* at 450 U.S. 221, quoted above. Similarly, Article 14.04, as interpreted and applied by the Court of Criminal Appeals in this case, conflicts with the holdings and/or comments of this Court in *Vale v. Louisiana, supra* (warrant necessary as goods seized were "not in process of destruction" or "about to be removed from the jurisdiction"); *United States v. Jeffers*, 343 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59 (1951) (warrant necessary as "no question of . . . imminent destruction, removal, or concealment of the property"); *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948) (warrant necessary as no "property in the process of destruction" or "likely to be destroyed") and *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948) (warrant necessary as "no evidence or contraband was threatened with removal or destruction").

CONCLUSION

The questions presented by this Petition are substantial and are of national significance. The parameters of the exigent circumstance exception in the context of searches and arrests inside private residences merits this Court's attention. Certiorari should be granted.

Respectfully submitted,

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